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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1967

No. 782

INTERNATIONAL CABLE T.V. CORPORATION, a California Corporation,

*Petitioner,*

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and PETER E. MITCHELL, WILLIAM M. BENNETT, A. W. GATOV, GEORGE G. GROVER, and FREDERICK H. HOLOBOFF, the members of and constituting said Public Utilities Commission,

*Respondents,*

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a California Corporation, and ALL METAL FABRICATORS, INC., a California Corporation.

*Real Parties in Interest.*

## PETITION FOR A WRIT OF CERTIORARI

**to the Supreme Court of the State of California**

HAROLD R. FARROW,
1506 Latham Square Building,
Oakland, California 94612,

DIRKS B. FOSTER,
44 Montgomery Street, Suite 2900,
San Francisco, California 94104,

*Attorneys for Petitioner International Cable T.V. Corporation.*

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*Respondents,*

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a California Corporation, and ALL METAL FABRICATORS, INC., a California Corporation.

*Real Parties in Interest.*

## PETITION FOR A WRIT OF CERTIORARI to the Supreme Court of the State of California

International Cable T.V. Corporation prays that a writ of certiorari issue to review the judgment of the

Supreme Court of the State of California, entered in the above-entitled case on July 26, 1967.

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## OPINIONS BELOW

The opinion of the respondent Public Utilities Commission is not yet published. The opinion, and the dissent thereto, are annexed hereto as Appendix A. The Public Utilities Commission's Order denying a rehearing is attached hereto as Appendix B. The Petition to the Supreme Court of the State of California for a Writ of Review or in the Alternative, for a Writ of Mandamus, and the subsequent Petition for Rehearing to the Supreme Court of the State of California were both denied without opinion. The notices thereof are attached hereto as Appendix C.

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## JURISDICTION

The decision of the California Public Utilities Commission was issued on November 9, 1966, to become effective on November 19, 1966. A Petition for Reconsideration to the Public Utilities Commission, timely filed, was denied without opinion. A timely Petition for Writ of Review was filed with the Supreme Court of the State of California on January 9, 1967 and was denied without opinion on July 5, 1967. A timely Petition for Rehearing was filed with the California Supreme Court on July 20, 1967 and was denied without opinion on July 26, 1967. On October 24, 1967, petitioner applied for an extension

of ten days within which to file the within petition. Said application was granted on October 26, 1967.

The jurisdiction of this court is invoked under 28 U.S.C. Section 1257.

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**STATEMENT OF GROUNDS**

A concise statement of the grounds upon which jurisdiction of this Court is invoked is as follows:

The only appellate review allowed from decisions of the respondent Commission is by way of petition for writ of review to the Supreme Court of the State of California.[1] Whether or not the petition for review is allowed is discretionary with that Court.

The California Supreme Court, by denying without opinion the Petition for Writ of Review and for Rehearing, has established the attached decision of the Public Utilities Commission as controlling precedent within the State of California for petitioner and for all parties similarly situated. The Public Utilities Commission decision, on a case of first impression within the state, made an arbitrary classification between members of the public and, relying on that classification, dismissed petitioner's complaint which had alleged discrimination against it by a regulated public utility. The Public Utilities Commission made its decision while denying petitioner an opportunity to be heard with respect to the issues of law and fact

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[1]Public Utilities Code, Sections 1756 through 1767. These sections are set forth verbatim in Appendix D hereto.

decided. Thus the respondent Commission not only sanctioned a denial to petitioner of equal protection of the laws, but denied petitioner due process during the course thereof. Petitioner is one company in the new and rapidly growing community antenna television (CATV) industry, every member of which is similarly situated. The present and future of this industry, and of regulated public utilities are inextricably interwoven.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

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## QUESTIONS PRESENTED

The questions presented on this petition are as follows:

1. Whether petitioner was denied a hearing and an opportunity to present evidence on the questions of fact and mixed questions of law and fact necessarily decided by the respondent Commission, thereby denying petitioner due process in contravention of the Fourteenth Amendment.

2. Whether the subject decision makes an arbitrary and unreasonable discriminatory classification between members of the public, thereby depriving petitioner of equal protection of the laws and contravention of the Fourteenth Amendment.

3. Whether the subject decision is supported by substantial, or any, evidence.

## STATUTES AND REGULATIONS INVOLVED

Public Utilities Code of the State of California, Section 453—No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudic or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. The commission may determine any question of fact arising under this section. (Deering's California Codes, Vol. 1, Public Utilities, p. 81.)

Public Utilities Code of the State of California, Section 207—"Public or any portion thereof" means the public generally, or any limited portion of the public, including a person, private corporation, municipality, or other political subdivision of the State, for which the service is performed or to which the commodity is delivered. (Deering's California Codes, Vol. 1, Public Utilities, p. 14.)

Public Utilities Code of the State of California, Section 701—The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction. (Deering's California Codes, Vol. 1, Public Utilities, p. 141.)

The Constitution of the United States, Amendment 14, Section 1—All persons born or naturalized in the United States, and subject to the

jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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**STATEMENT OF FACTS**

As indicated, no trial on the merits of this matter has been had. Yet the subject decision refers to and discusses many factual matters taken from the pleadings, the memoranda submitted the parties, and the limited material presented at the hearing on the temporary restraining order issued by the respondents. Further, the making of the decision necessarily involved determinations as to matters of fact on issues raised by the complaint, and not tried. No findings of fact were prepared, submitted, or ruled upon. Accordingly, the following factual material, which is taken from the decision (Appendix A) unless otherwise indicated, cannot be considered as settled except in certain instances.

On March 31, 1964, pursuant to Section 53066 of the Government Code of the State of California,[2] pe-

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[2]The Government Code of the State of California, Section 53066 provides—Any city or county or city and county in the State of California may, pursuant to such provisions as may be prescribed by its governing body, authorize by franchise or license the construction of a community antenna television system. In connection therewith, the governing body may prescribe such rules and regu-

titioner secured a non-exclusive franchise from the County of Los Angeles (App. A, p. 16) which entitled petitioner to build, own and operate a community antenna television system anywhere within the non-incorporated area of the County of Los Angeles.

During January, 1966, petitioner formally applied to The Pacific Telephone and Telegraph Company, hereafter known as The Pacific Company, to lease pole line facilities in the Altadena area. (App. A, p. 16.)

The Pacific Company pole attachment policy, which it claimed it had developed and consistently adhered to with the object of conserving available pole space, was to permit, on its own poles or those jointly owned with other utilities, only one CATV pole attachment per pole on a first-come-first-served basis. The Pacific Company further claimed that this policy had been carried out on a non-discriminatory basis, which had proved workable and in accord with the generally

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lations as it deems advisable to protect the individual subscribers to the services of such community antenna television system. The award of the franchise or license may be made on the basis of quality of service, rates to the subscriber, income to the city, county or city and county, experience and financial responsibility of the applicant plus any other consideration that will safeguard the local public interest, rather than a cash auction bid. Any cable television franchise or license awarded by a city or county or city and county pursuant to this section may authorize the grantee thereof to place wires, conduits and appurtenances for the community antenna television system along or across such public streets, highways, alleys, public properties or public easements of said city or county or city and county. Public easements, as used in this section, shall include but shall not be limited to any easement created by dedication to the city or county or city and county for public utility purposes or any other purpose whatsoever. (Deering's California Codes, Vol. 7, Government Code, 1966 Pocket Supplement, p. 49.)

accepted economics of the CATV industry, i.e., that any given area will support only one CATV system, and that Pacific had at the time of the hearing some 120 pole attachment agreements in effect, which agreements provided that they were subject to the approval first obtained of the Public Utilities Commission of the State of California, and to such modification or change as the Commission might order. (App. A, pp. 4-5.) Pacific further asserted that from the inception of the industry, it has, without exception, furnished pole attachment space to the first applicant for such space who could fulfill the obligations set forth in the agreement; i.e., pole attachment space has been rendered on a first-come-first-served basis. (App. A, p. 26.)[3]

Petitioner's written application to lease pole line facilities from The Pacific Company covering the Altadena area was prepared and delivered to The Pacific Company on January 11, 1966 and was executed by petitioner and The Pacific Company on March 28, 1966. (App. A, p. 6.)

However, real party in interest All Metal had been discussing with The Pacific Company the same geographical area with respect to CATV service. On February 28, 1966, All Metal made application to The Pacific Company to lease channel facilities for all but a portion of the same area of Altadena which was the

[3]The source of this material is the pleadings and memorandum of The Pacific Company. Whether or not the policy is actually administered in a non-discriminatory manner would be impossible to ascertain without a hearing.

subject matter of the agreement between petitioner and The Pacific Company. At that time, All Metal advised The Pacific Company that it had received a franchise from the County of Los Angeles as of February 17, 1966. In fact, the franchise was not acquired until March 8, 1966, and was not to be effective until the completion of publication. (App. A, pp. 16-17.)

Following the execution of the pole attachment agreement between petitioner and The Pacific Company, the latter volunteered to discharge the duty of filing the same with the Public Utilities Commission and of securing its approval, or authorization thereof pursuant to the Commission's rules. (App. A, pp. 6-7.) Petitioner was advised by The Pacific Company that until such approval or authorization was secured neither The Pacific Company nor petitioner could take any further steps to implement the agreement. (App. A, p. 17.) However, The Pacific Company delayed until the 28th of April, 1966, before filing the agreement with the Commission, and thereafter took no steps to obtain approval. (App. A, p. 2.)

By contrast, the agreement between All Metal and The Pacific Company was filed on the same date on which it was executed. (App. A, p. 2.) This latter agreement provided that The Pacific Company would make diligent efforts to have the facilities available for All Metal before September 15, 1966. (App. A, p. 8.) The Pacific Company admitted that during July, 1966, the construction for All Metal was commenced and pursued expeditiously until the issuance

by the respondents of the temporary restraining order on August 16, 1966. At that time, the work had been substantially completed. (App. A, p. 8.) Petitioner had alleged that the construction was on a crash basis. (App. A, p. 2.) Petitioner also claimed that the activities of The Pacific Company and All Metal Fabricators was the result of a conspiracy to delay petitioners entry into the CATV business in the particular area of Los Angeles County. (Cpl. Paras. VIII, XV, XVI, XXII, XXX.)

Though not dealt with by the decision, petitioner's complaint alleged in particularity a number of overt acts on the part of real parties in interest by which the discrimination against petitioner was effectuated. (Cpl., Paras. XXVI, XXVII, XXVIII and XXIX.)

Prior to the decision of respondent Commission, attached hereto as Appendix A, it was the established practice of The Pacific Company, concurred with by respondent Commission, to obtain the approval or authorization of the Commission before implementing any agreements of the nature of those between The Pacific Company and All Metal, and The Pacific Company and petitioner. Neither service was offered, or accepted, pursuant to the provisions of any tariff on file with respondent Commission or with any other commission. To the extent that The Pacific Company furnished leased pole line facilities or leased channel facilities, it did so pursuant to special contracts of the exact same stature insofar as the respondent Commission was concerned. (App. A, pp. 2, 5, 6, 7, 17, 25-26, 34-35, and see Footnote 2 at p. 6.)

On August 15, 1966, petitioner's complaint was filed with the respondent Commission. On August 16, 1966, the Commission, on consideration of the allegations of the complaint, and in order to preserve the status quo, issued and served a temporary restraining order, together with copies of the complaint, directing immediate cessation of construction of the subject facilities and ordered a hearing on August 19, 1966. Defendants were directed to file answers to the complaint on or before that date and such time as might be designated by the presiding officer. (App. A, pp. 3-4.) The hearing on the temporary restraining order was held before Examiner Gregory, at which time some evidence was received, and defendants, neither of whom had theretofore filed answers, were directed to file answers on or before August 31, 1966. Memoranda of Points and Authorities were requested from various parties and the temporary restraining order was ordered to remain in effect until further order of the respondent Commission. (App. A, p. 4.) Thereafter, answers were filed, and all parties submitted Memoranda.

The next thing that occurred was that on November 9, 1966, while petitioner was preparing for trial or hearing on the issues raised by the pleadings, the respondent Commission issued the decision which is set forth in Appendix A hereto.

Accordingly, the first opportunity afforded petitioner to raise the issues presented by the petition was on the 21st day of November, 1966, when a petition for reconsideration with respect to the decision

of the respondent Commission was filed. In that petition, it was contended that the Commission had made a decision on questions of fact and on questions of mixed law and fact which created an unreasonable and discriminatory classification. It was further contended that the Commission had done so without giving petitioner an opportunity to present evidence thereon, and without providing for a hearing on the merits of the case, in violation of the principles of due process and of equal protection of the laws, and in contravention of applicable decisions of the Supreme Court of the United States.

As indicated by Appendix B, the petition for reconsideration was denied without opinion.

Thereafter, a petition for Writ of Review, or in the alternative, for a Writ of Mandamus, and Memorandum of Points and Authorities in support thereof was directed to the Supreme Court of the State of California, S.F. 22,494. In that petition and memorandum and in the reply of petitioner to the answer thereto, and in the petition for rehearing directed to that Court the same contentions were made. In each instance, the petitions were denied without opinion.

Petitioner has timely raised the federal considerations involved and has exhausted all available state remedies in a timely manner.

## REASONS FOR GRANTING THE WRIT

### THIS CASE PRESENTS NEW QUESTIONS VITALLY IMPORTANT TO THE PUBLIC AND THE NASCENT CATV INDUSTRY

This case presents a novel question bearing on the ability to survive of the independent CATV industry. A CATV business's ability to enter and stay in business depends on two basic ingredients—a license or franchise from a political subdivision, and access to utility poles located on public rights of way and dedicated to public use. A major portion of the investment in said business is represented by the cables, wires, and electronic components attached to those poles. For obvious reasons telephone operating companies wish to own and control all such facilities and all access thereto. The decision of the Public Utilities Commission has serious and far-reaching results. One result will be that independent CATV operators who construct their own system will be discriminated against, insofar as access to poles is concerned, in favor of those operators who will be willing to lease channel facilities from a telephone company. This fact, coupled with the clear intention of the telephone companies, as evidenced by their active and growing participation in the industry through leaseback arrangements, will inevitably lead to even tighter control of market entry by its effect on local franchise authorities, and may presage the demise of the independent operator in the industry.

This case then actually involves not only one operator in Altadena, California, but hundreds of operators in California, and uncounted ones in other parts

of the country. The public, as well as the rapidly growing CATV industry,[4] is affected because they, as telephone subscribers, are paying for the telephone companies' involvement in the industry, and they may be affected as to the cost and quality of CATV services.

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**PETITIONER WAS DENIED A HEARING AND AN OPPORTUNITY TO PRESENT EVIDENCE**

The decision itself (App. A) demonstrates that no hearing was had on the merits. (App. A, p. 4.) At the "hearing" referred to by the decision, only one witness was heard, and that witness was produced solely for the purpose of showing justification for the continuance of the restraining order pending further pleadings. (App. A, p. 6.)

It is also clear from a reading of the opinion that decisions were made on questions of fact, and on mixed questions of law and fact. For example, on page 13 of Appendix A there appears the following:

> Extended reference has been made to Pacific's answer not only to indicate the broad context in which this controversy arises, but also because, unlike the answer filed by All Metal, it meets complainant's allegations squarely and thus, together with the complaint, forms a well-defined frame within which to consider *the mixed questions of law and fact disclosed by the pleadings.* (App A, p. 13; emphasis added.)

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[4] According to *Television Fact Book,* No. 37 (1967) Seventh Volume, p. 54 a, there are 1,700 operating CATV systems serving 2,000,000 television homes throughout the country.

The ultimate finding of the decision is:

> We hold that Pacific, in providing the facilities or service described in the International and All Metal agreements in question, did not violate the provisions against preference or prejudice set forth in section 453 of the California Public Utilities Code. (App. A, p. 36.)

In order to reach this ultimate finding the decision first had to decide that those members of the public using leased pole line facilities were different in kind, rather than in degree, from those members of the public using leased channel facilities. In addition, the respondent Commission deemed it necessary to find that The Pacific Company had made a public offering of the latter type of service, but had not made such a public offering of the former. Further, though the opinion fails to deal expressly with the matter, in order for the decision to be valid, there also must be an implied finding that the classification made between members of the public was a reasonable one.

Petitioner believes that such evidence as was available, the uncontradicted allegations of the pleadings and the admissions of the parties, clearly indicates the exact contrary of these findings. However, whether right or wrong, these decisions were of fact, and were made without hearing, and without allowing petitioner an opportunity to produce evidence relevant to the questions.

The rule is well established that, when an administrative body acts judicially, notice and an opportunity for hearing are indispensable to due process. *Brink-*

*erhoff-Faris Trust & Sav. Co. v. Hill,* 50 S.Ct. 451, 281 U.S. 673, 74 L.ed. 1107, 1113; *Magnolia Petroleum Co. v. Carter Oil Co.,* C.A. Okl. 1955, 218 F.2d 1 (6) cert. den. 75 S.Ct. 605, 349 U.S. 916, 99 L.ed. 1249. Due process of law includes reasonable notice and the right to be heard, whether the tribunal exercising jurisdiction over the rights and privileges protected by the due process clause is judicial, legislative, or administrative. *Morgan v. United States,* 58 S.Ct. 773, 304 U.S. 1, 82 L.ed. 1129; *Willner v. Committee on Character & Fitness,* 83 S.Ct. 1175, 373 U.S. 96, 10 L.ed.2d 224, cf. *Interstate Commerce Com. v. Louisville & N.R. Co.,* 33 S.Ct. 185, 227 U.S. 88, 57 L.ed. 431.

Assuming, arguendo, that there is any difference in kind between the services to be performed by The Pacific Company for one type of agreement as opposed to the other, any proper classification of the two should be a function performed by the Commission after appropriate hearings on the merits. The decision necessarily involves mixed questions of law and fact. *Western Union Tel. Co. v. Call Pub. Co.,* 21 S.Ct. 561, 181 U.S. 92, 45 L.ed. 765; *Pennsylvania Co. v. United States,* 35 S.Ct. 370, 236 U.S. 351, 59 L.ed. 616; *Baringer & Co. v. United States,* 63 S.Ct. 967, 319 U.S. 1, 87 L.ed. 1171. Such being so, the proper parties are entitled to present evidence in connection therewith. This is nothing more than a simple matter of constitutional due process. *Morgan v. United States, supra.*

Further, and again assuming for the purpose of argument, that there is in fact any such difference in

the services, and that a proper classification had been properly arrived at, any difference in treatment to be afforded to the various classes of the public must be reasonable. Reasonableness is, again, a factual issue within the jurisdiction of the Commission to rule upon and is subject to the same standards of due process.

The hearing did not meet those standards set forth in *Railroad Commission of California v. Pacific Gas & Electric Co.*, 58 S.Ct. 334, 302 U.S. 388, 82 L.ed. 319 (322), which stated,

> "There must be due notice and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial and the Commission must act upon evidence and not arbitrarily."

Not only must there be notice and an opportunity to be heard, but an opportunity to give evidence. Merely summoning a party to Court and then making a determination of issues, and of the factual questions without a hearing is not due process. (*Burket v. Reliance Bank & Trust Co.*, 367 Ill. 196, 11 N.E.2d 6.)

The need for a full and fair hearing before the Commission is especially vital in view of the failure of the state to provide appellate review from a decision of the respondent Commission. Review may only be obtained by petition addressed to the Supreme Court of California[5] and no new or additional evidence may be introduced.[6] The issue here is similar in many respects to that raised in *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 57 S.Ct.

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[5]Public Utilities Code Section 1756. See Appendix D for text.
[6]Public Utilities Code Section 1757. See Appendix D for text.

724, 301 U.S. 292, 81 L.ed. 1093. In that case, the commission had before it a question of evaluation of telephone company properties as of a date certain and during succeeding years.

After extensive hearings, which produced a voluminous record, the commission chose to adjust property values on the basis of information not contained in the record by the expediency of taking judicial notice of certain economic indices, and without giving the telephone company an opportunity to explain or rebut. The sole method of review of the commission's decision was by petition in error to the state Supreme Court, which did not consider new evidence. The Supreme Court said that in such cases, where there is no trial de novo, regulatory bodies with broad administrative discretion must maintain a policy of a fair and open hearing throughout the entirety of the proceedings. (*Id.*, pp. 1101-1102.) The holding was that the telephone company had been deprived of the kind of fair hearing essential to due process.

The departure from due process in the instant case was of the same nature, but was of far greater degree.

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**THE SUBJECT DECISION DEPRIVED PETITIONER, AND THOSE SIMILARLY SITUATED, OF EQUAL PROTECTION OF THE LAW**

Respondent Commission attempts to support its findings by referring to The Pacific Company's "public offering" of leased channel facilities, as evidenced by The Pacific Company's attempt to file a tariff

covering such services. This is contrasted with the lack of such a public offering of leased pole line facilities, and the "passive" nature of the telephone company's service in such a situation.

There was no evidence indicating that the telephone company's services were "passive" on the one hand and not on the other. In truth, the telephone company's position is not passive in either situation and an evidentiary hearing will so demonstrate. As to the tariff offering, the decision itself points out in a footnote on page 2 that the proposed tariff was suspended by the respondent Commission and later withdrawn by The Pacific Company. Further, the decision refers to the fact that The Pacific Company states that it is prepared to make a tariff offering with respect to leased pole line facilities.

Thus, the decision demonstrates that both services are performed pursuant to the exact same type of offering, i.e., special contracts, filed for Commission, "approval," following this decision; and filed for, "authorization," prior to the time of this decision.

The only real evidence available as to a "public offering" is that produced by the pleadings and admissions of The Pacific Company. These demonstrate that The Pacific Company had maintained for years a fixed policy with respect to leased pole line facilities, i.e., first come, first served, one customer only, and that there were 120 such agreements in effect at the time of the hearing. Contrasted with this was the demonstration that there were only two leased channel facility agreements in effect in the whole of the oper-

ating territory of the company prior to the one at issue in the subject decision.

As is pointed out by the two dissenting Commissioners (App. A, p. 38), the concept of "dedication," "holding out," or "public offering" looks to what a utility does.

Petitioner did not, and does not take a position as to whether or not a telephone company offering of leased pole line facilities, or leased channel facilities, or either of them, are, or are not public utility services by nature. Petitioner's only position is that whatever they are, they are so closely interrelated, so directly affect market entry and market control by their effect on access to poles dedicated to public use and located on public rights-of-way, that they ought to be treated the same. And, if any distinctions are to be made, the result must be such that the telephone company is not left with an uncontrolled license to discriminate. *Nebbia v. New York,* 54 S.Ct. 505, 291 U.S. 502 (525), 78 L.ed. 940, 89 ALR 1469. It is also settled that the reasonableness of such regulation depends on the relevant facts. *Nebbia v. New York, supra; Hartford Co. v. Harrison,* 57 S.Ct. 838, 301 U.S. 459, 81 L.ed. 1223.

Although Public Utilities Code Section 453 is not discriminatory on its face, it is well established that a statute lawful on its face may become unlawful through its application. *Gregory v. Barr,* 203 F.2d 364. "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by ex-

press terms of a statute or by its improper execution through duly constituted agents." *Glicker v. Michigan Liquor Control Commission,* 160 F.2d 96 (99) citing from *Sunday Lake Iron Company v. Township of Wakefield,* 38 S.Ct. 495, 247 U.S. 350, 62 L.ed. 1154.

There is no rational grounds for making a distinction between the two groups of operators. The difference involved is one of degree only, not of kind. Both are lessees of the telephone company; both construct their own antenna and accessory equipment; both provide CATV services to members of the public; both depend for their very livelihood on access to utility poles dedicated to the public and located on public rights-of-way; and both kinds of operators and the telephone company are well aware that there is, in economic fact, only room for one in any given geographic area.

Classifications must embrace all who belong in the same category and may not be capricious or arbitrary. *Royster Guano Co. v. Virginia,* 40 S.Ct. 560, 253 U.S. 412, 64 L.ed. 989; *Pfeiffer Brewing Co. v. Bowles,* 146 F.2d 1006, cert. den. 65 S.Ct. 913, 324 U.S. 865, 89 L.ed. 1420.

Petitioner recognizes that a law is not unconstitutional merely because it results in financial injury to a citizen where it is reasonably necessary to preserve important public interest. Neither is it unconstitutional because it preserves one interest over another if there is a preponderant public concern in the preservation of one over the other. *Porter v. Shibe,* 158 F.2d 68. However, the instant decision

demonstrates no public interest or public concern to justify a classification which protects channel leases as opposed to pole line leases. The public concern would seem, in fact, to be contra to this policy. The public is best served when healthy competition is encouraged, and it has long been accepted public policy to encourage independently owned small business.

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**THE SUBJECT DECISION IS NOT SUPPORTED BY SUBSTANTIAL, OR ANY, EVIDENCE**

Where there is an insufficiency of evidence, or no substantial evidence to support a finding by an administrative board and its decision results in a deprivation of property, as it did in the instant case, the deprivation is without due process of the law. Forkosch, *Constitutional Law,* Section 188. In order for a conclusion of fact to be supported by substantial evidence, there must be a rational connection between the facts proved and the facts inferred.

It is petitioner's contention that the few facts which can be accepted from admissions in the pleadings in no way support the conclusion of the respondent Commission. Such being the case, it may reasonably be inferred that in order to reach these conclusions, the Commission must have used facts found outside the evidentiary record, or has made its decision without any substantial evidence. In either case petitioner has been denied due process. *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, supra; Tot v. United States,* 63 S.Ct. 1241, 319 U.S. 463, 87 L.ed. 1519.

## CONCLUSION

The Court is presented here with a novel question of immense importance to a new industry and involving the important constitutional guarantees of the Fourteenth Amendment. Proper application of these guarantees, before the Courts and the Commission, is one way in which the relationship between the telephone industry and the CATV may be worked out.

It may be the only way.

Wherefore, your petitioner prays that the subject decision be reversed, and that the Public Utilities Commission of the State of California be required to reopen proceedings for full evidentiary hearings on the issues necessarily involved to render a decision on the complaint of petitioner.

Dated, October 31, 1967.

Respectfully submitted,
HAROLD R. FARROW,
DIRKS B. FOSTER,
*Attorneys for Petitioner*
*International Cable T.V.*
*Corporation.*

**(Appendices A, B, C and D Follow.)**